IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1126

FRANK D. STANLEY and the O/S NATIONAL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CITATIONS

Cases:

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v.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Frank D. Stanley and the O/S National (Frank Stanley, claimant) pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the forfeiture of his vessel, the O/S National, and his conviction in the United States District Court for the Northern District of California of importation of and possession with intent to distribute marijuana and conspiracy to commit those offenses.

OPINIONS BELOW

The *per curiam* opinion of the court of appeals, not yet officially reported, and the opinion in *United States v. Stanley*, 545 F.2d 661 (9th Cir. 1976), to which the *per curiam* opinion refers are printed in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1977. A timely petition for rehearing was denied on January 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Title 19 U.S.C. §1581(a):

> (a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized within a customs-enforcement area established under sections 1701 and 1703-1711 of this title, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

QUESTION PRESENTED

Whether an American fishing vessel, which has been sighted in an American harbor and is thereafter bound coastwise in international waters, as to which there is no reasonable belief that it has touched or traded at

any foreign port or place, nor that it is bound outward for any foreign port or place, may be boarded and searched without a warrant, probable cause or consent, under the ostensible authority of 19 U.S.C. §1581(a); specifically:

(a) Given the history of customs laws from 1789, conferring an exemption from customs searches upon domestic and fishing vessels not bound to or from a "foreign port or place," did this search violate the fourth amendment and the relevant statutes?

(b) Does a vessel licensed for the fisheries share with licensed yachts and undocumented American pleasure vessels a statutory and case-law exemption from the "board-and-search-at-will" provision of 19 U.S.C. §1581(a)?

(c) Does the border search exception extend to the warrantless search of a domestic vessel which has *left* an American harbor?

(d) What is the border which must be crossed at sea before a border search can be conducted?

STATEMENT OF THE CASE

This case asks, in a context amenable to the drawing of rational and persuasive distinctions, whether an American fishing vessel bound coastwise from an American port may be the proper subject of a border search. No case remotely like this one has ever been decided by this Court, even though the authority of customs officers to search at the border without a warrant or probable cause is older than the fourth amendment itself.[1] The search at will of such vessels

[1] Title 19 U.S.C. §1581(a) was passed, in its earliest form, by the first Congress. Act of July 31, 1789, c. 5, §24, 1 Stat. 29, 43. The history of the statute is discussed more extensively below.

under the purported customs search laws, though never authorized by this Court, has become a common occurrence of late and threatens to abolish the fourth amendment protection of domestic waterborne commerce and of the millions of small pleasure, fishing and commercial craft now plying American coastal waters.

The facts are as follows: On the morning of February 6, 1976, a deputy sheriff of Sonoma County, California, was called to the dock area of the Harbor Fishing Company, Bodega Bay. He observed a U-Haul rental truck with its right rear wheels broken through the pier. Although there was another broken plank and tire marks near the end of the dock, the driver denied that he had backed down the pier. He produced a California driver's license for identification, and left in another vehicle to get a hydraulic jack to release the truck.

After the driver had gone, the sheriff discovered some marijuana residue around the truck, inside of it, and near the end of the pier. He concluded that marijuana had been loaded or unloaded.

No vessel was actually seen near the pier at the approximate time of the supposed transfer.

The sheriff questioned local fisherman, and learned that five boats left the harbor that morning. Two of these, including the O/S National, were foreign (boats not berthed at Bodega Bay), and three were local.

The deputy knew that all boats leaving Bodega Bay must follow the course of a channel leading from a point near the Harbor Fish Company pier straight out through the mouth of the Bay. He also knew that approximately one-hundred-fifty vessels were in Bodega Bay that morning and most of the fishing boats were

rigged similarly to the National.[2] However, he phoned the Coast Guard to request apprehension of the National because it was the least well-known of the five vessels.

A Coast Guard cutter, Point Ledge, was dispatched to intercept the National, which was first observed by the cutter just south of Point Arena, proceeding northward, about nine miles from the coastline. It was, by this time, five hours since the National had been sighted at Bodega. Forty minutes later, the Point Ledge pulled alongside the National and two customs patrol officers and a member of the United States Coast Guard boarded, identified themselves, and announced their intention to search. One of the customs officers opened the cargo hatch in the fantail and found bales of marijuana. Stanley, master of the National, was placed under arrest and his vessel was seized. After a suppression hearing, the district court found the search without probable cause and held it not a border search because there was no evidence that the National had ever been in Mexican waters. The contraband was held inadmissible, and a judgment of a non-forfeiture was entered.

The court of appeals reversed, 545 F.2d 661 (printed in Appendix), holding that although there was no probable cause and no evidence that the National had been in Mexican waters, the search was a proper border search because the National had left United States territorial waters, and although the National's movements had not been observed for several hours, there was a "reasonable certainty" that it had crossed the three-mile maritime "border" with the contraband.

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[2]The National was enrolled and licensed for the mackerel fisheries. This entitled it to fish for all species.

On remand, the petitioner waived jury trial and was convicted as charged in the indictment, and a judgment of forfeiture was reentered. The court of appeals affirmed in an order (printed in Appendix) which referred to its earlier opinion.

REASONS FOR GRANTING THE WRIT

I.

The opinion below presents important constitutional questions which have never been decided by this Court, is a formidable extension of the border search exception as this Court has defined it, and determines the rights of a large segment of the American public.[3]

This is not another land border search case, riding the wake of *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), and petitioning this Court further to trace the fine distinctions that have recently been made in that area of federal law.[4] Rather, it involves the search without a warrant, probable cause or consent of an American fishing vessel bound coastwise from an American port, under the purported authority of 19 U.S.C. §1581(a)—a statute which has never been directly addressed by this Court.

This issue was not decided by the most recent pronouncement in the border search area, *United States v. Ramsey*, 431 U.S. 606 (1977).[5]

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[3]The court of appeals' analysis of the constitutional questions in this case has been criticized. 65 Geo. L. J. 1641 (1977).

[4]*See United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Ortiz*, 422 U.S. 891 (1975); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

[5]*United States v. Biswell*, 406 U.S. 311 (1972) and *Camara v. Municipal Court*, 387 U.S. 523 (1967) are not controlling. The government has never attempted to justify the search in this case as a check on fishing license requirements or regulations, or as a Coast Guard safety inspection. The Fifth Circuit has invalidated a "pretext search" conducted by the agents of the Drug Enforcement Administration after a vessel was boarded under provisions of law authorizing Coast Guard safety inspections. *United States v. Warren*, 550 F.2d 219 (5th Cir.), *rehearing granted*, 558 F.2d 327 (1977).

[footnote continued]

In *Ramsey*, customs officials opened international letter-class mail which had arrived from a foreign place. The search was upheld because: (a) customs officials had "reasonable cause to suspect" that there had been a violation of customs laws; (b) the statutory authority upon which the officers proceeded is limited by a "reasonable cause" requirement, 19 U.S.C. §482; and, (c) given this statutory limitation and the long-standing recognition that searches of persons and things *entering* the country at the functional equivalent of the border are not subject to fourth amendment probable cause requirements, a higher standard need not be applied.

The statute now before the Court, 19 U.S.C. §1581(a) was not discussed in *Ramsey*, and contains no standards or limiting language whatsoever.

As stated above, this Court has never had the occasion or opportunity to examine §1581(a), much less to weigh the merits of an "exit border search". But the novelty of this case does not imply that it is trivial, unique or incapable of recurrence. The ruling below places millions of watercraft and their passengers and crews beyond the protections of the fourth amendment.[6] The court of appeals' finding that there must be

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[6]The precise number of watercraft affected cannot be determined through available statistics. As of 1976, there were 3,937,067 numbered undocumented pleasure craft in the coastal states. Department of Transportation, Coast Guard, Boating Statistics, 1976, CG-357, and over 60,000 documented com-

[footnote continued]

a "reasonable certainty" that a vessel in international waters has crossed the border with contraband places no significant limit on the number of watercraft which can be reached. The National was never seen near the pier where the supposed transfer took place and went unobserved for several hours. Moreover, there has been no claim that it came from abroad with cargo; the government's claim has rested on the National having crossed the invisible three-mile line.

Indeed, the situation is similar to that which existed prior to *Almeida-Sanchez v. United States, supra.* Prior to that decision, 8 U.S.C. §1357(a) and 8 C.F.R. §287.1 allowed the Border Patrol to search at will any automobile within one-hundred miles of the border. As 19 U.S.C. §1581(a) was applied below, it confers an equally "extravagant license." 413 U.S. at 268.

The court of appeals' regarded its decision as "an extension of present law." The opinion below has a significant impact on the reasonable expectations of the American people now plying our coastal waters. For

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mercial craft, Merchant Marine Safety Information and Analysis, 1976. Available statistics do not distinguish between those pleasure craft which are principally used inland and those berthed or used principally on coastal waters. However, the above figures do not include a very large number of sailing vessels without motors, for which a figure is unavailable. The Boat Safety Act of 1971, Pub. L. No. 92-75, §17, 85 Stat. 213 (1971), has left the numbering of watercraft without "propulsion machinery" to the states, on a voluntary basis. Many of these vessels are obviously capable of passing outside of the territorial seas. Information about the differences between numbering and documenting under the Boat Safety Act of 1971, which will give some idea of the importance of small boats and coastwise traffic may be found in C. Chapman, *Piloting, Seamanship and Small Boat Handling*, 29-50, 611-622 (52nd ed. 1976). *See also* P. Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 Calif. L. Rev. 661 (1963).

these reasons alone, the petition should be granted. *Katz v. United States,* 389 U.S. 347, 349 (1967).

II.

Beside the constitutional questions in this case, there are fundamental statutory and historical limitations on §1581(a) which were ignored by the court below and ought to be examined by this Court.

The broad authority purportedly conferred by §1581(a) can only be imputed to the statute when it is read out of context with the Tariff Act of 1930, of which it is a part. Below, petitioner's counsel briefed extensively the statutory and historical framework of §1581(a), concluding that it is only an enabling statute, allowing customs officials *to search only those vessels which are required by law to enter and clear customs and that fishing vessels are not in that category.* An outline of this history follows.

Title 19 U.S.C. §1581(a)[7] is modified, at the outset, by 19 U.S.C. §1441, which itemizes certain vessels not required to enter and clear customs.[8]

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[7]The essence of this section was one of the first statutes passed by the first Congress, the Act of July 31, 1789, c.5, §24, 1 Stat. 29, 43, which was carried forward by the Act of February 18, 1793, c. 8, §27, 1 Stat. 305, 315. In 1866 it was enacted in roughly its present form as Rev. Stat. §3059, and was superseded by §581 of the Tariff Act of 1922, which was in turn replaced by §581 of the Tariff Act of 1930, 46 Stat. 590, 747. The Act is intended, according to its title, "to provide revenue" and "to regulate commerce with foreign countries." The title is an aid to interpretation. 73 Am.Jur.2d., "Statutes," §98, at 322.

[8]Some of these exemptions go back to 1789, for example, that for war vessels and, in modified form, that for vessels arriving in distress. Act of July 31, 1789, c. 5, §§11-12, 1 Stat. 29, 38-39. Others were added later: *e.g.*, Act of March 2, 1799, c. 22, §31, 1 Stat. 627, 651 (public vessels generally); Act of July 4, 1872, c. 280, 17 Stat. 214 (ferry boats); Act of

[footnote continued]

Neither §1441 nor its predecessors in terms exempts vessels from the provisions of §1581(a). Rather, it defines categories of vessels with which the customs has no, or only a minimal or attenuated, lawful concern. When any such vessel crosses a maritime border, the customs procedures applicable to other vessels do not apply.

It may even be conceded for purposes of this case that vessels required to clear customs upon departure could also be subject to §1581(a). Clearance procedure for outbound vessels is established by 46 U.S.C. §91. *See United States v. Sischo*, 262 U.S. 165, 167 (1923) (manifest on outward-bound cargo). *The crucial point for this case is that the list contained in 19 U.S.C. §1441 of vessels not required to clear is not exclusive.* Section 1441 must be read together with other provisions of the Tariff Act of 1930. Section 1431 requires "the master of every vessel arriving in the United States and required to make entry" to have a manifest aboard. Other provisions make clear that the "arriving" must be from "a foreign port or place" in order for the manifest to be required. *E.g.*, §1432. See 24 Op. Att'y. Gen. 27 (1902); *Fish v. Brophy*, 52 F.2d 198 (S.D.N.Y. 1931).[9]

July 1, 1870, c. 185, §3, 16 Stat. 176, 177 (steam tugs). These provisions were codified in Rev. Stat. §§2791, 3123. The exception for yachts and undocumented American vessels was added in 1954. At that time, the Congress recognized that §1441 is an enforcement provision. See legislative history of Customs Simplification Act of 1954, 1954 U.S. Code Cong. & Admin. News 3900.

[9]For a discussion of the relationship between the search provision of 19 U.S.C. §1581(a) and the provisions of law relating to manifests, *see Compania Naviera Vascongada v. United States*, 354 F.2d 935 (5th Cir. 1966). *Fish v. Brophy*, cited in

[footnote continued]

19 U.S.C. §§1433 and 1434 are explicit that only vessels arriving in the United States from a foreign port or place need report arrival and make entry at the customhouse. 19 U.S.C. §1432a, added in 1935, extends the requirements of manifest, report of arrival and entry applicable to "any vessel which has visted any hovering vessel." A "hovering vessel" is the familiar rum runner's helper of Prohibition days which lay offshore in international waters and transshipped forbidden or dutiable goods via smaller craft. 19 U.S.C. §1401(n) defines "hovering vessel".

A fishing vessel, which leaves its American home port, goes to sea (no matter how far) and returns to its own or another American port, is not subject to entry and clearance because it is not arriving from a "foreign port or place." Hence, it, equally with the vessels enumerated in 19 U.S.C. §1441 (which by hypothesis have been to a foreign port or place but are nonetheless exempt), is not a proper subject of scrutiny under the broad powers conferred by 19 U.S.C. §1581(a).

The interrelationship of §§1431-41 and of §1581(a) is made clearer by reference to §1586, which is found in the same part of Title 19 as §1581, and which penalizes the unreported entry of vessels arriving "from a foreign port or place."[10] Generally accepted principles of statutory construction counsel reading these provi-

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the text, was discussed in *United States v. Tilton*, 534 F.2d 1363, 1365-66 (9th Cir. 1976). *See also United States v. Hayes*, 52 F.2d 977 (E.D.N.Y. 1931) (limiting searches without probable cause to those "with respect to the revenue").

[10]Prior provisions of law imposed duties of entry and clearance upon vessels not arriving from a foreign port or place in certain limited areas, but these have all been repealed. See 19 U.S.C.A. §1434, "Historical Note," p. 177.

sions together, in light of their common source in the Tariff Act of 1930. 73 Am.Jur.2d, "Statutes," §191.[11]

Enrollment and licensing procedures, which are found at 46 U.S.C. §§251-52, 263 are applicable to the National. A vessel which is enrolled may not be registered, and vice-versa. 46 U.S.C. §264.

It is evident that enrolled vessels are considered a part of the domestic commerce of the United States and not the foreign commerce. Indeed, the enrollment and licensing regulations are found in Chapter 12 of Title 46 U.S.C., which is entitled, "Regulation of Domestic Commerce." Enrollment and licensing entitles the vessel to engage in the fisheries or in the coastal trade. *See Badger v. Gutierez*, 111 U.S. 734, 736-37 (1884).

To complete the picture of the regulatory pattern which rules this case, we refer to 46 U.S.C. §310, which provides that when a vessel licensed for carrying on the fishery is to touch *and trade* at a foreign port, it must obtain permission from the appropriate collector of customs and is for that voyage subject to the requirements of entry and clearance applicable to other vessels engaged in foreign trade.[12] The collector's

[11]The same conclusion follows from another provision of the Tariff Act of 1930, which specifies that a vessel arriving in the United States from a foreign port or place shall deposit a copy of her "register, or document in lieu thereof" at the customhouse. 19 U.S.C. §§1434, 1437. A register differs from enrollment and licensing papers. Registry, on the other hand, applies to vessels "to engage only in trade with foreign countries" and with certain external noncontiguous territories of the United States. 46 U.S.C. §11. The distinctions are explained in the leading work of C. Chapman, *Piloting, Seamanship and Small Boat Handling*, 41-42 (52nd ed. 1976).

[12]46 U.S.C. §310 applies to vessels enrolled in the mackerel fishery. 46 U.S.C. §263. *See also The Pilot*, 36 F.2d 250, 252

[footnote continued]

permission will not be granted unless the act of touching and trading is in conjunction with a fishing voyage; otherwise, the enrollment must be delivered up and the vessel *registered* as required by law. 19 C.F.R. §4.15 (1977). See also the provision of former 48 U.S.C. §1486, repealed in 1962. 48 U.S.C.A. p. 657; 1977 Pocket Part, p. 158.

Similar distinctions appear when one considers the provisions of law applicable to outward-bound vessels. 46 U.S.C. §91 regulates such vessels, and they need have no concern with the customs authorities unless "bound to a foreign port."[13]

From this discussion, it may be seen that 19 U.S.C. §1581 does not stand isolated and free from the gloss of history, related provisions of law and historic usage. It is a provision limited to those classes of vessels which are in and of themselves likely to be the lawful subject of customs concern.

The exemptions from customs scrutiny which have been discussed above trace deep roots in our law, and are contemporaneous with the predecessor statutes of §1581.[14]

Thus, for example, the Act of 1789, §10, 1 Stat. at 38, limited the requirement of manifests to vessels

(D. Me. 1929) (coastwise vessel does not begin "foreign" voyage until she leaves last domestic port of call).

[13]The customs officers have no revenue collection function with respect to a vessel bound for a foreign port or place, because U.S. Const., art. 1, §9, cl. 5, forbids imposition of any tax on exports.

[14]Exemptions from customs scrutiny have occurred in other contexts as well. See 18 U.S.C.A. §965, "Historical and Revision Note," p. 326 (Secretary of Treasury requested exemption of fishing boats from manifest requirement to avoid unnecessary burden on domestic commerce).

bound "from any foreign port or place." And the distinction between registered and enrolled vessels, with special privileges for fishing[15] and coasting[16] vessels, first appears in "An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes," September 1, 1789, 1 Stat. 55.

This Court has "refused to impute to Congress the grant of 'unbridled discretion'" to a federal agency. *Kent v. Dulles,* 357 U.S. 116, 128 (1958); *Gutknecht v. United States,* 396 U.S. 295, 306 (1970). Title 19 U.S.C. §1581(a), read out of context with the rest of the Tariff Act of 1930 and regardless of the history and legitimate purposes of that Act, confers an awesome power to customs officials to board and search at will *any* vessel at *any* time, *anywhere* within the United States or customs waters. The foregoing discussion reveals that such "unbridled discretion" was never intended.

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[15]There is historically a close connection between the customs and admiralty jurisdictions, particularly because forfeiture proceedings are *in rem.* To this extent, it is relevant that under admiralty law as construed and applied in *The Paquete Habana,* 175 U.S. 677 (1900), fishing vessels are exempt from capture and forfeiture as prizes. The right of fishing vessels to proceed unmolested is traced by the Court in an opinion replete with historical and comparative learning.

[16]There have been times when more stringent regulation of the coasting trade has been permitted. The Embargo Acts provides one such example. Act of April 25, 1808, 2 Stat. 499. But even this Draconian measure does not appear to have applied to fishing vessels, and it was sustained against constitutional attack under the war power. *See generally* 1 C. Warren, *The Supreme Court in United States History,* 324-65 (rev. ed. 1926). Warren notes that some rather exuberant interpretations of the Act were restrained as unlawful.

Importation of marijuana and other contraband is a major problem in this country, which can be controlled by customs through its authority at the border or the functional equivalent thereof, by bilateral agreement, or on the basis of probable cause. But the domestic shipment or transportation of contraband, which this Court recognized in *Leary v. United States,* 395 U.S. 6, 41-43 (1969), is also a significant problem, ought only to be attacked in compliance with fourth amendment standards.

III.

The circuits and highest state courts have not adopted a consistent approach and rationale for non-entry or unusual customs searches, and the guidance of this Court is needed.

In *United States v. Williams,* 544 F.2d 807 (5th Cir. 1977), customs officials boarded and searched a houseboat moored at a marina having access to the open sea, without a warrant, probable cause or consent, under the purported authority of 19 U.S.C. §1581(a). The court declined to apply the literal terms of the section, and the evidence was suppressed.

In *United States v. Nunes,* 511 F.2d 871 (1st Cir. 1975), customs officials searched an airplane following an emergency landing. The court held that the "vessels . . . in distress" exemption of 19 U.S.C. §1441(4) is also in derogation of the broad powers ostensibly conferred by §1581(a).

In *People v. Esposito,* 37 N.Y.2d 156, 371 N.Y.S.2d 681, 332 N.E.2d 863 (1975), customs officials searched an airport baggage loader suspected of stealing from outgoing luggage, without probable cause, based on 19 U.S.C. §§482, 1496 and 1582, the companion statutes of §1581(a). The Court of Appeals of New York held

that the border search exception does not extend to searches of baggage going out of the country.

This last conclusion is not novel, and has been reached by a distinguished district judge on a prior occasion. In *United States v. Marti,* 321 F. Supp. 59 (E.D.N.Y. 1970), the defendant's luggage was searched at John F. Kennedy Airport and a necklace discovered which Marti was exporting in apparent violation of the export control laws. Judge Weinstein concluded that probable cause was required for the exit search, on an analysis similar to that made above. Judge Weinstein held that authority for an exit search rests in 22 U.S.C. §401(a), and that under that section probable cause, though not a warrant, is required.[17] It was noted that although §401(a) principally deals with arms and munitions, its literal language and a consistent course of federal decisional law make it applicable to all exit searches. 321 F. Supp. at 63.

Although these cases may not be in direct conflict with the decision below, they demonstrate an array of approaches to the scope of 19 U.S.C. §1581(a) and the border search exception in general and are inconsistent with the view of §1581(a) adopted by the court of appeals. In the absence of some direction from this Court, that confusion is likely to continue.

IV.

The Court of Appeals assumed that the border for purposes of a customs search at sea is the three-mile limit. This is a substantial federal statutory question which has never been decided by this Court and ought to be settled.

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[17]15 C.F.R. §379.8, cited by Judge Weinstein, was substantially amended, striking out the language mentioned in *Marti*, on June 12, 1970. This does not affect the validity of the rule stated in that case.

Without citation to authority the Court of Appeals stated, "it appears that the three-mile limit can qualify as a 'border' in the Fourth Amendment context." The three-mile limit is the traditionally accepted definition of "territorial waters".[18] But the border of the "customs waters," as that term is used in 19 U.S.C. §1581(a) is twelve miles from the coast. 19 U.S.C. §1401(m). The land borders of the United States and the twelve-mile limit are the only geographical limitations in Title 19. Thus, the only relevant border for the purposes of a customs search at sea is twelve miles from the coast, not three.[19] The court of appeals' definition of the border exposes a nine-mile strip in our coastal waters in which *any* domestic or pleasure vessel may be searched since there is no doubt that each of them has crossed the three-mile limit. The mobility of these boats, like that of automobiles, may justify some relaxation of the warrant requirement, as in *Carroll v. United States,* 267 U.S. 132 (1925). But there is no basis for the wholesale abrogation of probable cause.

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[18]This was originally based on the military power of the developed nations at the turn of the 18th century. At that time, it was the distance of effective cannon fire. Kent, *Historical Origin of the Three-Mile Limit,* 48 A.J. Intl. L. 537 (1954). The term "territorial waters" is not defined in the United States Code.

[19]This twelve-mile "contiguous zone" is permitted by Article 24 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, in force for the United States since September 10, 1964. However, according to a now famous statement by former Acting Secretary of State Herter, the twelve-mile limit has been the customs border of the United States since 1790. Acting Secretary of State Herter to the American Embassy, Manila, Instruction No. A-272, Jan. 31, 1958, M.S. Department of State file 399.731/1-1658, reprinted in 4 Whiteman, *International Law,* 489-90.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 10, 1978

APPENDIX

APPENDIX A

[Filed Nov 15 1977]

No. 77-1870

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK D. STANLEY,
Defendant-Appellant.

No. 77-1871

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THE O/S NATIONAL, her engines, tackle, appurtenances, etc., in rem,
Defendant-Appellant.

MEMORANDUM

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING, GOODWIN and KENNEDY, Circuit Judges

The sole issue is the validity of the warrantless search of the O/S National. This issue has been settled by our

previous decision in this case. *United States v. Stanley*, 545 F.2d 661 (9th Cir. 1976).

Affirmed. 20 Cir 2226

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* vs. FRANK D. STANLEY and MARIO GONZALEZ-GARCIA, *Defendants-Appellees.*	No. 76-1947
UNITED STATES OF AMERICA, *Plaintiff-Appellant,* vs. THE O/S NATIONAL, Her engines, tackle, appurtenances, etc., in rem, *Defendant,* FRANK D. STANLEY, *Claimant-Appellee.*	OPINION No. 76-2136

[November 5, 1976]

Appeal from the United States District Court
for the Northern District of California

Before: LAY,* WRIGHT and KILKENNY,
Circuit Judges.

WRIGHT, Circuit Judge:

The government appeals both the district court's grant of defendants' motion to suppress all evidence seized in a warrantless search of The O/S National and the entry of a judgment of non-forfeiture. Defendants were charged with importation of

*Honorable Donald P. Lay, United States Circuit Judge of the Eighth Circuit, sitting by designation.

marijuana,[1] possession with intent to distribute, conspiracy to import, and conspiracy to possess with intent to distribute, in violation of 21 U.S.C. §§ 952(a), 841(a)(1), 963, and 846. Approximately 11,000 pounds of marijuana were found aboard the vessel and its forfeiture and condemnation were requested by the government under the provisions of 21 U.S.C. § 881(a)(4) and 49 U.S.C. § 782. The criminal and civil cases were consolidated for appeal.

I.

FACTS

On February 6, 1976, a Sonoma County deputy sheriff was called to the dock area of the Harbor Fish Company, Bodega Bay, California, where he observed a two-ton U-Haul rental truck with its right rear wheels broken through the pier. The driver told the officer that he was waiting for a fishing vessel to drop off some crab pots to be delivered to Eureka, California. The dock manager testified that tire tracks and a broken plank indicated that the truck had backed all the way down the pier to the loading area. This was denied by the driver. The driver then departed to obtain a hydraulic jack to free the truck.

After the driver left, the deputy noticed marijuana debris near the rear of the truck, inside it, and near the end of the pier by the water. He learned from local fishermen that two foreign boats (one well-known in Bodega Bay) and three local boats had left the harbor that morning, passing by the Harbor Fish Company pier as they were outbound. The less well-known foreign boat, The O/S National, was rigged for albacore fishing, then available only in southern California or Mexican waters.

Suspicious that illegal activity was afoot, the deputy phoned the Coast Guard, requesting apprehension of The O/S National. The National was first seen about nine miles from the coastline and was boarded 40 minutes later by Customs Patrol and Coast Guard personnel. Marijuana was found in the hold. The defendants were arrested and The National seized.

The district court determined that (1) there was insufficient probable cause to support a warrantless search, (2) there was insufficient evidence to warrant a finding that The O/S National

[1] Marijuana is a controlled substance within the meaning of 21 U.S.C. §§ 812 and 881(a)(1).

had recently sailed from Mexican waters so as to sustain the action as a border search, and (3) because there was no probable cause and no border search, the search could not be sustained as a customs search pursuant to 19 U.S.C. § 1581(a).

II.

PROBABLE CAUSE

As a fundamental rule, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (Footnotes omitted.) *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception is the finding of probable cause coupled with exigent circumstances. In this case, our holding as to probable cause makes it unnecessary to reach the issue of exigent circumstances.

"As a matter of routine practice, this circuit recites and evaluates primary evidence whenever reviewing a question of probable cause in a criminal case." *United States v. One Twin Engine Beech Airplane*, 533 F.2d 1106, 1108 (9th Cir. 1976).

The O/S National had entered the harbor after midnight on the morning of the 6th and, as previously noted, was one of several vessels proceeding out of the channel early that morning. The trial judge found that it was seen leaving the harbor from the direction that *any* vessel would have come when heading out to sea. He also noted that the rigging of O/S National was not so unusual as to trigger a connection with Mexico or contraband. In fact, it was rigged in the same manner as were 60% of the vessels berthed in Bodega Bay.

What was missing was a connection between The O/S National and the site of the marijuana transfer. In *United States v. Bates*, 533 F.2d 466 (9th Cir. 1976), probable cause was found where defendant had twice driven to and left a known smuggling area where the modus operandi was the picking up of smuggled goods by car. In *United States v. One Twin Engine Beech Airplane*, 533 F.2d 1106 (9th Cir. 1976), an informer had witnessed the defendant airplane land in Mexico on a semi-deserted road which was temporarily blockaded while the plane accepted some packages and then took off.

In the instant case, no vessel was actually seen near the Harbor Fish Company pier at the approximate time of the alleged transfer. The mere fact that The O/S National was a relatively unknown vessel in the area and had passed by the pier as it left the harbor is insufficient to support a reasonable belief that it was connected with the crime. The district court's finding of no probable cause was correct.

III.

CUSTOMS SEARCH

From 1789 when the first border search statute was enacted,[2] customs officials have been authorized to stop and examine incoming persons or baggage on suspicion that merchandise is concealed which is subject to duty or cannot be legally imported into the United States. Today there is similar legislative authority for boarding and searching vessels by Customs and the Coast Guard. 19 U.S.C. § 1581(a) provides:

> Any officer of the customs[3] may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters . . . and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle and use all necessary force to compel compliance.[4] [Footnotes added.]

The first issue is whether a customs search may be predicated on 19 U.S.C. § 1581(a) alone. As the court in *United States v. Weil*, 432 F.2d 1320 (9th Cir. 1970), *cert. denied* 401 U.S. 947 (1971), noted in construing 19 U.S.C. § 482, a related statute:

> In order to avoid conflict between this statute and the Fourth Amendment, the statutory language has been re-

[2]Act of July 31, 1789, ch. 5, 1 Stat. 29, 43 (1789).

[3]Both Customs Patrol Officers and Coast Guard personnel are deemed "officers of the customs." 19 U.S.C. § 1401(i).

[4]19 U.S.C. § 1401(m) defines customs waters to be those within 12 miles (four leagues) of the United States coast. 19 C.F.R. 162.63 declares that searches under the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.*, and the Controlled Substances Import and Export Act, 21 U.S.C. §§-951 *et seq.* are to be handled in the same manner as other customs searches.

> stricted by the courts to "border searches." We must remember, however, that the phrase "border search" does not appear in either the statute or the Constitution. It is merely the courts' shorthand way of defining the limitation that the Fourth Amendment imposes upon the right of customs agents to search without probable cause.

Id. at 1323.

Consistent with this, the Court in *Almeida-Sanches v. United States*, 413 U.S. 266 (1973), teaches that an act of Congress cannot validate searches which offend Fourth Amendment standards. *Id.* at 272. In that case the government sought to justify a warrantless auto search 25 miles north of the Mexican border solely on the basis of § 287(a)(3) of the Immigration and Nationality Act [8 U.S.C. § 1357(a)(3)], providing for warrantless searches of automobiles and other conveyances "within a reasonable distance from any external boundary of the United States."[5] The Court held the search unconstitutional, stating:

> In the absence of probable cause or consent, that search violated the petitioner's Fourth Amendment right to be free of "unreasonable searches and seizures."
>
> It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

413 U.S. at 273.

By analogy, a search based solely on 19 U.S.C. § 1581(a) is unreasonable if it sweeps more broadly than the Fourth Amendment allows. In the absence of probable cause or consent, it is unreasonable unless it falls within an exception to the Fourth Amendment prohibition against unreasonable searches and sei-

[5]The Attorney General's regulation 8 C.F.R. § 287.1(a)(2) defined "reasonable distance" as "within 100 air miles from any external boundary of the United States."

zures. A border search has been held to be such an exception. *United States v. Tilton*, 534 F.2d 1363, 1364 (9th Cir. 1976); *United States v. Solmes*, 527 F.2d 1370 (9th Cir. 1975); *United States v. Ingham*, 502 F.2d 1287 (5th Cir. 1974); *Klein v. United States*, 472 F.2d 847 (9th Cir. 1973).

In these cases a valid border was identified and a search undertaken on the basis of customs laws. In all the cases, however, the defendants were crossing the border while coming *into* the United States. No case has been found where the constitutionality of a search was premised on the border search exception in the context of one being stopped and searched while leaving the United States. That is the situation presented here.

It is clearly established that a *border* was crossed. Courts have held that the crossing of the international border three miles from the United States coast and *entry* into territorial waters justifies a valid border search. *United States v. Tilton, supra* at 1366; *United States v. Hill*, 430 F.2d 129, 131 (5th Cir. 1970).[6]

Whether crossing the border *leaving* territorial waters should be treated as a typical border search opportunity, in the absence of a definitive ruling one way or the other, can be determined by comparing the justifications for the two types of border crossings, incoming and outgoing.

Border searches are not repugnant *per se*. The original customs statute exempting border searches of incoming vehicles and persons from the requirements of probable cause was passed by the same First Congress which proposed the Bill of Rights. The Supreme Court has argued that this demonstrates the validity of the present border search exemption. *Boyd v. United States*, 116 U.S. 616, 623 (1886).

Diverse policy interests also underlie the exception. The purpose behind border searches has been variously phrased as the

[6]Thus it appears that the three mile limit can qualify as a "border" in the Fourth Amendment context. It is sufficient that customs officers be reasonably certain that the border was crossed. *Tilton*, 534 F.2d at 1366. Actual observation of the border crossing is not necessary. *United States v. Ingham*, 502 F.2d 1278 (9th Cir. 1974). In this case, The O/S National was seen leaving the harbor in the morning of the 6th and was later sighted nine miles off shore, leaving no doubt that the border had been crossed.

need to stem the "flow of illegal aliens" into the United States, *United States v. Martinez-Fuerte*, ... U.S. ....., 44 U.S.L.W. 5336, 5338 (July 6, 1976); to "prevent importation of contraband or of undeclared . . . merchandise," *United States v. Weil*, 432 F.2d 1320, 1323 (9th Cir. 1970); and to "search . . . newly arrived vessel[s] to determine whether goods requiring entry are aboard," *United States v. Ingham*, 502 F.2d at 1291.

Other justifications include "the universal understanding that persons, parcels and vehicles crossing the border may be searched," *United States v. Weil, supra* at 1323, and the "recognition of the difficulty involved in effectively policing our national boundaries." *United States v. Hill*, 430 F.2d 129, 131 (5th Cir. 1970).[7]

Realization of customs officials' special problems has resulted in courts giving the broadest interpretation compatible with our constitutional principles in construing the statutory powers of customs officials. *See United States v. Glaziou*, 402 F.2d 8 (2nd Cir. 1968), *cert. denied* 393 U.S. 1121 (1969).

Regulation of importation is not the only duty that Congress has given customs officials, however. The Comprehensive Drug Abuse Prevention and Control Act of 1970 makes illegal the exportation of marijuana and other drugs under certain circumstances. 21 U.S.C. § 955 provides that it is "unlawful for any person to bring or possess on board any vessel . . . *arriving in or departing from the United States or the customs territory of the United States*, a controlled substance . . ." (emphasis added).

The purpose of the act was to deal in a comprehensive fashion with the growing menace of drug abuse in the United States by providing authority for increased efforts in drug abuse prevention and more effective means for law enforcement aspects of drug abuse prevention and control. *See* H. R. Rep. No. 91-1444 in U.S. Code & Adm. News at 4567, 91st Cong., 2d Sess. (1970). Regulation of exportation was evidently deemed necessary by

[7]Although special problems of enforcement should be given weight in determining the reasonableness of a search, *Ker v. California*, 374 U.S. 23, 33-34 (1963), they would not justify unwarranted infringement of the Fourth Amendment's protections resulting from the pressure of official expedience. *See Almeida-Sanchez*, 413 U.S. at 274.

Congress to protect Americans against the growth of drug trafficking. *See* 21 U.S.C. §§ 953, 955.

The Fourth Amendment was designed to balance the government's interests in enforcing its laws against the individual's interests in his dignity and privacy. A person leaving the country belongs to a class whose members sometimes violate certain laws in leaving.[8] On crossing a border, he is on notice that a search may be made, and his privacy is arguably less invaded by such search.

Because these searches are administered to a morally neutral class, they lack the quality of insult felt by one singled out for a search. *See* Note, 77 Yale L.J. 1007 (1968).

Thus both incoming and outgoing border-crossing searches have several features in common: (1) the government is interested in protecting some interest of United States citizens, such as restriction of illicit international drug trade, (2) there is a likelihood of smuggling attempts at the border, (3) there is difficulty in detecting drug smuggling, (4) the individual is on notice that his privacy may be invaded when he crosses the border, and (5) he will be searched only because of his membership in a morally neutral class.

Although this may be an extension of present law, the similarity of purpose, rationale, and effect between the two types of border searches compels us to hold that the search here was proper. Although it did not take place precisely at the three-mile limit, the Supreme Court has noted that border searches may take place not only at the border itself, but at its functional equivalent as well. *Almeida-Sanchez*, 413 U.S. at 273.

This court has recently held that a bay adjacent to an ocean is a functional equivalent of a border for vessels which have travelled in foreign waters before entry. *United States v. Solmes*, *supra*. For obvious reasons, "it is not practical to set up checkpoints at the outer perimeters of the territorial waters." *United States v. Tilton*, 534 F.2d at 1365.

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[8]Drug export laws are not the only laws involved. In *United States v. Gonsales-Rodriguez*, 513 F.2d 928 (9th Cir. 1975), for example, appellant was convicted of exportation of arms and ammunition without obtaining the required export license.

For the same reasons we feel that a search in customs waters is a functional border search when the vessel has crossed from territorial waters of the United States and there is sufficient evidence to convince a fact finder, to a reasonable certainty, that any contraband which might be found at the time of the search was also aboard at the border crossing. *Alexander v. United States*, 362 F.2d 379, 382 (9th Cir.), *cert. denied* 385 U.S. 977 (1966).

The order granting the motion to suppress is reversed, as is the judgment of non-forfeiture, and the case is remanded for further proceedings.

KILKENNY, Specially Concurring:

I fully concur with Judge Wright's analysis of the facts and his application of the border search law to those facts.

I have a firm belief that the record is also sufficient to compel a finding of probable cause for the search, but in the light of our conclusion on the validity of the border search find no sound reason for passing on the issue of probable cause.